

CARLSMITH BALL LLP

IAN L. SANDISON 5597  
TIM LUI-KWAN 2271  
JOHN P. MANAUT 3989  
ASB Tower, Suite 2100  
1001 Bishop Street  
Honolulu, HI 96813  
Tel No. 808.523.2500  
Fax No. 808.523.0842  
[isandison@carlsmith.com](mailto:isandison@carlsmith.com)  
[tluikwana@carlsmith.com](mailto:tluikwana@carlsmith.com)  
[JPM@carlsmith.com](mailto:JPM@carlsmith.com)

Attorneys for Applicant  
UNIVERSITY OF HAWAI'I AT HILO

RECEIVED  
OFFICE OF CONSERVATION  
AND COASTAL LANDS

2016 NOV 17 P 3:36

DEPT. OF LAND &  
NATURAL RESOURCES  
STATE OF HAWAII

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF

Contested Case Hearing Re Conservation  
District Use Application (CDUA) HA-3568 for  
the Thirty Meter Telescope at the Mauna Kea  
Science Reserve, Ka'ohē Mauka, Hāmakua,  
Hawai'i, TMK (3) 4-4-015:009

Case No. BLNR-CC-16-002

UNIVERSITY OF HAWAI'I AT HILO'S  
**OPPOSITION TO TEMPLE OF  
LONO'S MOTION TO VACATE  
MINUTE ORDER NO. 39 OR,  
ALTERNATIVELY TO PARTIALLY  
RECONSIDER MINUTE ORDER NO.  
39 [DOC. 409]; CERTIFICATE OF  
SERVICE**

**UNIVERSITY OF HAWAI'I AT HILO'S OPPOSITION TO TEMPLE OF LONO'S  
MOTION TO VACATE MINUTE ORDER NO. 39, OR ALTERNATIVELY  
TO PARTIALLY RECONSIDER MINUTE ORDER NO. 39 [DOC. 409]**

Applicant UNIVERSITY OF HAWAI'I AT HILO ("University") submits its opposition  
to Temple of Lono's ("Temple") *Motion to Vacate Minute Order No. 39 or, Alternatively to  
Partially Reconsider Minute Order No. 39*, filed on November 6, 2016 [Doc. 409] (the  
"Motion").

## **I. INTRODUCTION**

On November 6, 2016, the Temple filed its Motion seeking to vacate or partially reconsider Minute Order No. 39 (the “**Order**”), issued by the Board of Land and Natural Resources (the “**Board**”) on October 28, 2016. The Order denied various motions to disqualify the Hearing Officer in this proceeding. The Temple now seeks to vacate this Order, alleging that the Board’s own statements limit its authority and jurisdiction to rule on motions to disqualify the Hearing Officer on non-jurisdictional grounds. However, it is indisputable that the Board and its Chair have the authority to delegate hearing responsibilities to and appoint a Hearing Officer. That authority inherently includes the power to revoke that appointment, if the circumstances require it. Contrary to the Temple’s assertion, the Board’s Order does not contradict the Board’s authority, nor could it.

In the alternative, the Temple seeks a partial reconsideration of the Order, despite not presenting any new evidence or arguments that would warrant such relief. As demonstrated below, the Temple has failed to present any argument that would warrant vacating or reconsidering the Order. Accordingly, the University respectfully requests that the Board deny the Motion.

## **II. ARGUMENT**

### **A. THE BOARD HAS JURISDICTION TO RULE ON MOTIONS TO DISQUALIFY THE HEARING OFFICER**

The Temple does not dispute that the Board—through the Chair—has the authority to select and appoint the Hearing Officer. *See* Hawai‘i Administrative Rules (“**HAR**”) § 13-1-32(b). Implicit in the Board’s authority to appoint the Hearing Officer is its authority to remove her, if appropriate. However, the Temple incorrectly argues that, by virtue of Minute Order No. 17, the Board narrowly defined its jurisdiction over motions to disqualify the Hearing Officer.

The Temple's sole basis for its argument is that the Board somehow ceded its jurisdiction due to allegedly conflicting statements in Minute Order No. 17. No such conflict exists. Rather, the Temple attempts to manufacture a contradiction by quoting portions of that Minute Order out of context. As discussed below, the Temple's arguments lack merit.

As an initial matter, the Temple's argument is based on the false premise that the Board is able to limit its jurisdiction by its own statements. There is no legal support for this position. The Board's jurisdiction is defined by the law and the implementing regulations, not the Board's own statements. As discussed above, the Board's power to rule on motions to disqualify—and effectively remove—the Hearing Officer is inherent in its authority to select and appoint the Hearing Officer. *See* HAR § 13-1-32(b). The Temple failed to cite any legal authority to support its contention that the Board lacks jurisdiction to rule on motions to disqualify unless they relate to jurisdictional issues or where the Hearing Officer has already ruled on the motion.

Even if the Board could limit its jurisdiction through its own statements, it did not do so here. The Temple asserts that the Board's statement that "only matters relating to the selection and appointment of the hearing officer are properly before the Board" is irreconcilable with the Board's subsequent statement that "the selection and appointment of the hearing officer and the task of addressing motions to disqualify the hearing officer clearly remain within the authority of the Board." *See* Minute Order No. 17 at 3, 6. The statements, taken on their face, are not contradictory, but, rather, are consistent with the fact that the Board's express authority to appoint a Hearing Officer carries with it the implicit authority to rescind that appointment. Nonetheless, the Temple appears to argue that in stating that "only matters relating to the selection and appointment of the hearing officer," the Board ceded its jurisdiction over motions to disqualify the Hearing Officer. However, that statement was made by the Board to clarify the

scope of Minute Order No. 14, which denied Dwight Vicente’s *Motion to Disqualify the Hearing Officer and the State of Hawai‘i for Lack of Jurisdiction to Hear the Contested Case Hearing* [Doc. 80] (“**Vicente Motion**”).

The Vicente Motion argued that because the Hearing Officer’s authority is a result of the illegal annexation and overthrow of the Kingdom of Hawai‘i, she should be disqualified for lack of proper jurisdiction. In Minute Order No. 14, the Board rejected Mr. Vicente’s arguments that the State of Hawai‘i is not legally a state and rejected Mr. Vicente’s attempt to disqualify the Hearing Officer on jurisdictional grounds. After the Board issued Minute Order No. 14, the Temple submitted its *Motion to Vacate Ruling and Supplement Response Time* [Doc. 127]. The Temple subsequently submitted its Statement of Position on the already-decided Vicente Motion, urging the Board to rule on the sovereignty issues raised in the Vicente Motion. [Doc. 132 at 11]. Stephanie-Malia Tabbada and Dwight Vicente filed motions in support of the Temple’s *Motion to Vacate Ruling and Supplement Response Time*, also advocating, *inter alia*, for the recognition of the Kingdom of Hawai‘i and the illegal annexation of the State. As a result, in Minute Order. 17, the Board clarified that Minute Order No. 14 “only addresses Mr. Vincentes’s motion to disqualify the hearing officer on the basis that the State of Hawai‘i lacks subject matter jurisdiction to hear the contested case.” The Board’s statement that “only matters relating to the selection and appointment of the hearing officer are properly before the Board” merely reflects its decision that motions seeking an affirmative ruling on the issues of Hawai‘i sovereignty or statehood are not properly before the Board, and does not restrict or conflict with the Board’s jurisdiction over motions to disqualify the Hearing Officer. Indeed, the Board has repeatedly exercised its full authority to rule on issues of disqualification when it rejected the numerous, duplicative motions seeking to disqualify the Hearing Officer. *See, e.g.*, Minute Order Nos. 14,

17, and 39.

Because the Temple's attempt to vacate the Order is based on errors in fact and law, the Board should deny the Motion.

B. THE TEMPLE HAS NOT PRESENTED ANY NEW EVIDENCE OR ARGUMENTS THAT WARRANT RECONSIDERATION OF THE ORDER

The Temple's Motion should be denied because it does not raise any new arguments or evidence to warrant reconsideration of the Order. As noted by the Board in Minute Order No. 17 [Doc. 245], motions for reconsideration are not "a device to relitigate old matters or to raise arguments or evidence that could and should have been brought during the earlier proceeding." *Sousaris v. Miller*, 92 Hawai'i 505, 513, 993, P.2d 539, 547 (2000). The Temple does not present any new evidence or arguments that were not previously raised (or could and should have been raised) in the various pleadings addressed by the Order.

1. The Issue of Simultaneous Submissions Has Already Been Decided and the Temple's Motion Does Not Present Any New Argument or Evidence

The Temple argues that reconsideration of the Order is warranted because the Hearing Officer demonstrated bias when she wrongfully required all parties to submit their initial contested case documents—*i.e.*, opening statements, written direct testimony, witness lists, and exhibit lists (collectively, the "**Initial Documents**")—at the same time. However, Petitioners<sup>1</sup> already raised this argument in their *Renewed Motion to Disqualify Hearing Officer* [Doc. 340], and the Temple joined in this argument through its *Substantive Joinder and Supplement to Petitioners Mauna Kea Anaina Hou, et al.'s Renewed Motion to Disqualify Hearing Officer* [Doc. 343]. The Board ruled that the Hearing Officer acted within its discretion in setting the timeline for submission of the Initial Documents and that this decision did not demonstrate any

---

<sup>1</sup> "Petitioners" refers to Mauna Kea Anaina Hou and Kealoha Pisciotto; Clarence Kukauakahi Ching; Flores-Case 'Ohana; Deborah J. Ward; Paul K. Neves; and KAHEA: The Hawaiian Environmental Alliance.

evidence of bias. *See* Order at 4. The Temple’s Motion does not raise any new arguments, and merely argues that the Board erred in its ruling. This is not a proper ground for reconsideration.

To the extent the Temple has raised any “new” arguments, the Temple offers no justification as to why it could not have raised those arguments earlier in the proceeding. After Petitioners and the Temple raised their argument regarding the timeline for submission of the prehearing materials, the University responded, noting that that the Hearing Officer had the authority under HAR § 13-1-32(c) to require all parties to submit their prehearing materials simultaneously. *See* Statement of Position Regarding Petitioners’ Renewed Mot. to Disqualify Hr’g Officer and Notice of Withdrawal of Counsel [Doc. 369] at 10-11 (“**Statement of Position**”). The Temple had every opportunity to respond to this argument, and in fact did file its response to the University’s Statement of Position but declined to respond to address the University’s argument regarding the Board’s authority to set timelines under HAR § 13-1-32(c). [Doc. 386]. The Temple should not be permitted to have a second bite at the apple. The Temple gambled on its litigation strategy and lost. That—without more—is not proper basis for reconsideration of the Order. *See Sousaris*, 92 Hawai‘i at 513, 993 P.2d at 547 (2000) (a motion for reconsideration is not “a device to relitigate old matters or to raise arguments or evidence that *could and should have been brought during the earlier proceeding*”) (emphasis added).

Moreover, to the extent that the Temple’s “new” arguments could not have been raised previously, they still fail to provide a basis for reconsideration here. In its Motion, the Temple merely points out that the University, as the applicant, has the “initial burden of going forward” and therefore should be required to present its case before the remaining parties. Mot. at 6-8 (citing *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 290 (1968)). The Temple misrepresents the holding and language of *Cities Service Co.*, as the quote “initial burden

of going forward” does not appear anywhere in that opinion. Moreover, *Cities Service Co.* is not relevant here as it relates to the standards for summary judgment motions under Rule 56(e) of the Federal Rules of Civil Procedure (“**FRCP**”). *Cities Service Co.* at 289-290, 88. S.Ct. 1593. Nothing in *Citi Service Co.* relates to—much less supports—the Temple’s assertion that the CDUA applicant is required to provide its prehearing materials first. Accordingly, the Board correctly relied on HAR § 13-1-32(c) in ruling that the Hearing Officer had the discretion to require all parties to submit file their prehearing materials simultaneously. Therefore, the Temple’s request for reconsideration should be denied.

2. The Issues Regarding the Temple’s Motion to File Motion Out of Time Have Already Been Ruled Upon and the Temple Presents No New Argument or Evidence Warranting Reconsideration of the Order

The Temple argues that reconsideration of the Order is warranted because the Board wrongfully affirmed the Hearing Officer’s denial of its *Motion to File Motion Out of Time* [Doc. 179], and did so based on new arguments. The Motion states that, in making its ruling, the Board cited HAR § 13-1-32(c), which was not previously raised by the Temple or the other parties. The Temple argues the Board’s citation of its own rules of practice and procedure somehow constitutes a new argument that establishes grounds to reconsider the Order. This argument is plainly illogical. Moreover, the Board’s rules of practice and procedure have governed since day one of this contested case proceeding, and all parties should be aware of this fact. The Temple should not be allowed to now claim ignorance of these rules in an attempt to assert that the Board’s Order raised “new” arguments that the Temple was unaware of. Whether or not it was raised with regards to the *Motion to File Motion Out of Time*, the Temple should have been aware of the Hearing Officer’s authority under the administrative rules, and if the Temple believed it did not apply in that instance, it should have raised that issue in its previous pleadings.

The Temple also goes on to rehash old arguments regarding the Hearing Officer's failure to allow the Temple to be heard on its *Motion to Dismiss Conservation District Use Application HA-3568* [no docket number]. Mot. at 8-10. Again, simply restating arguments that were previously raised does not warrant reconsideration of the Order.

3. The Board's Alleged Mischaracterization of the Temple's Argument Does Not Warrant Reconsideration of the Order

The Temple argues that the Board should reconsider its Order because it misinterpreted the Temple's position regarding the deficiency of Minute Order No. 19 [Doc. 281]. The Temple previously sought disqualification of the Hearing Officer based on her order setting the issues in this proceeding (Minute Order No. 19). The Board's Order denied that motion, noting that the Hearing Officer did not demonstrate bias when "she set issues in the contested case hearing that [the Temple] did not agree with[.]" Order at 4. The Temple now asserts that it did not object to Minute Order No. 19 on the grounds that the Hearing Officer did not adopt its proposed issues, but instead, objected because the Hearing Officer did not provide a detailed explanation of its ruling. But in fact, the Temple asserted multiple grounds for bias, including, *inter alia*, that Hearing Officer demonstrated bias by not adopting its proposed issues in Minute Order No. 19. In its *Substantive Joinder and Supplement to Petitioners' Renewed Motion to Disqualify Hearing Officer* [Doc. 343], the Temple argues:

Later, the Temple submitted the issues that the Temple asserted should be heard in the contested case hearing. The Temple included the character of the Applicant as one such issue. The Hearing Officer excluded that issue when deciding what issues will be heard. The Hearing Officer again violated the Due Process rights of the Temple.

*Id* at 3-4. The Temple argued the due process violations—including the exclusion of the Temple's proposed issue—was evidence of the Hearing Officer's bias, and she should be disqualified as a result. The Board rejected the Temple's arguments when it denied Petitioners'



Renewed Motion to Disqualify Hearing Officer. *See* Order. The Temple's attempt to mischaracterize its own pleadings to support this Motion is unavailing and does not warrant reconsideration of the Order.

4. Semantic Differences in the Board's Interpretation of the Facts Do Not Warrant Reconsideration of the Order

The Temple argues that the Board mischaracterized the disposition of its motion requesting recusal and its objection to the Hearing Officer's absence of written orders. Given that the Board has again denied the Petitioners' and the Temple's attempt to disqualify the Hearing Officer and the Hearing Officer has ruled on all timely filed prehearing motions, the Temple's complaints are moot. Moreover, the Temple cites to no new fact or authority that warrants reconsideration. Indeed, the Temple does not appear to seek reconsideration of the Order based on the alleged mischaracterizations. Rather, the Temple appears to simply be airing its grievances to the Board. Therefore, the Board should disregard those arguments.

**III. CONCLUSION**

The Temple has failed to provide any basis for vacating or reconsidering the Order here. The Temple incorrectly argued that the Board, by its own statements, did not have jurisdiction to issue the Order. Additionally, the Temple failed to produce any new evidence or arguments that warrant reconsideration of the Order here. The Temple merely rehashes old arguments and repeatedly states its dissatisfaction with the Board's ruling. These are not proper grounds for vacating or reconsidering the Order. Accordingly, the University respectfully submits that the Temple's Motion should be denied.

DATED: Honolulu, Hawai'i, November 17, 2016.

A handwritten signature in black ink, appearing to read 'Ian L. Sandison', is written over a horizontal line.

IAN L. SANDISON  
TIM LUI-KWAN  
JOHN P. MANAUT

Attorneys for Applicant  
UNIVERSITY OF HAWAI'I AT HILO

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

IN THE MATTER OF

Contested Case Hearing Re Conservation  
District Use Application (CDUA) HA-3568 for  
the Thirty Meter Telescope at the Mauna Kea  
Science Reserve, Ka‘ohe Mauka, Hāmakua,  
Hawai‘i, TMK (3) 4-4-015:009

Case No. BLNR-CC-16-002

CERTIFICATE OF SERVICE

**CERTIFICATE OF SERVICE**

The undersigned certifies that the above-referenced document was served upon the  
following parties by email unless indicated otherwise:

DLNR Office of Conservation and Coastal  
Lands (“OCCL”)  
[dlnr.maunakea@hawaii.gov](mailto:dlnr.maunakea@hawaii.gov)

MICHAEL CAIN  
Office of Conservation and Coastal Lands  
1151 Punchbowl Street, Room 131  
Honolulu, HI 96813  
[michael.cain@hawaii.gov](mailto:michael.cain@hawaii.gov)  
*Custodian of the Records*  
*(original + digital copy)*

DAVE M. LOUIE, ESQ.  
CLIFFORD K. HIGA, ESQ.  
NICHOLAS R. MONLUX, ESQ.  
Kobayashi Sugita & Goda, LLP  
[dml@ksglaw.com](mailto:dml@ksglaw.com)  
[ckh@ksglaw.com](mailto:ckh@ksglaw.com)  
[nrm@ksglaw.com](mailto:nrm@ksglaw.com)  
*Special Deputy Attorneys General for*  
*ATTORNEY GENERAL DOUGLAS S. CHIN,*  
*THE DEPARTMENT OF THE ATTORNEY*  
*GENERAL, and DEPUTY ATTORNEYS*  
*GENERAL IN THEIR CAPACITY AS*  
*COUNSEL FOR THE BOARD OF LAND AND*  
*NATURAL RESOURCES and HEARING*  
*OFFICER*

WILLIAM J. WYNHOFF, ESQ.  
Deputy Attorney General  
[bill.j.wynhoff@hawaii.gov](mailto:bill.j.wynhoff@hawaii.gov)  
*Counsel for the BOARD OF LAND AND*  
*NATURAL RESOURCES*

J. DOUGLAS ING, ESQ.  
[douging@wik.com](mailto:douging@wik.com)  
ROSS T. SHINYAMA, ESQ.  
[rshinyama@wik.com](mailto:rshinyama@wik.com)  
Watanabe Ing LLP  
*Counsel for TMT INTERNATIONAL  
OBSERVATORY, LLC*

JOSEPH KUALII LINDSEY CAMARA  
[kualiic@hotmail.com](mailto:kualiic@hotmail.com)

HARRY FERGERSTROM  
P.O. Box 951  
Kurtistown, HI 96760  
[hankhawaiian@yahoo.com](mailto:hankhawaiian@yahoo.com)  
*(via email & U.S. mail)*

WILLIAM FREITAS  
[pohaku7@yahoo.com](mailto:pohaku7@yahoo.com)

TIFFNIE KAKALIA  
[tiffniekakalia@gmail.com](mailto:tiffniekakalia@gmail.com)

BRANNON KAMAHANA KEALOHA  
[brannonk@hawaii.edu](mailto:brannonk@hawaii.edu)

GLEN KILA  
[makakila@gmail.com](mailto:makakila@gmail.com)

JENNIFER LEINA'ALA SLEIGHTHOLM  
[leinaala.mauna@gmail.com](mailto:leinaala.mauna@gmail.com)  
[leina.ala.s808@gmail.com](mailto:leina.ala.s808@gmail.com)

LANNY ALAN SINKIN  
[lanny.sinkin@gmail.com](mailto:lanny.sinkin@gmail.com)  
*Representative for the Temple of Lono*

MAUNA KEA ANAINA HOU  
c/o Kealoha Pisciotto  
[keomaivg@gmail.com](mailto:keomaivg@gmail.com)

LINCOLN S.T. ASHIDA, ESQ.  
[lsa@torkildson.com](mailto:lsa@torkildson.com)  
NEWTON J. CHU, ESQ.  
[njc@torkildson.com](mailto:njc@torkildson.com)  
Torkildson, Katz, Moore, Hetherington &  
Harris  
*Counsel for PERPETUATING UNIQUE  
EDUCATIONAL OPPORTUNITIES (PUEO)*

DWIGHT J. VICENTE  
2608 Ainaola Drive  
Hilo, HI 96720-3538  
[dwightjvicente@gmail.com](mailto:dwightjvicente@gmail.com)  
*(via email & U.S. mail)*

RICHARD L. DELEON  
[kekaukike@msn.com](mailto:kekaukike@msn.com)

CINDY FREITAS  
[hanahanai@hawaii.rr.com](mailto:hanahanai@hawaii.rr.com)

C. M. KAHO'OKAHI KANUHA  
[kahookahi.kukiaimauna@gmail.com](mailto:kahookahi.kukiaimauna@gmail.com)

KALIKOLEHUA KANAELE  
[akulele@yahoo.com](mailto:akulele@yahoo.com)

MEHANA KIHAI  
[uhiwai@live.com](mailto:uhiwai@live.com)

MAELANI LEE  
[maelanilee@yahoo.com](mailto:maelanilee@yahoo.com)

STEPHANIE-MALIA: TABBADA  
[s.tabbada@hawaiiantel.net](mailto:s.tabbada@hawaiiantel.net)

HARVEY E. HENDERSON, JR., ESQ.,  
Deputy Attorney General  
[harvey.e.hendersonjr@hawaii.gov](mailto:harvey.e.hendersonjr@hawaii.gov)  
*Counsel for the Honorable DAVID Y. IGE, and  
BLNR Members SUZANNE CASE and  
STANLEY ROEHRIG*

E. KALANI FLORES  
[ekflores@hawaiiintel.net](mailto:ekflores@hawaiiintel.net)

DEBORAH J. WARD  
[cordylinecolor@gmail.com](mailto:cordylinecolor@gmail.com)

YUKLIN ALULI, ESQ.  
Law Offices of Yuklin Aluli  
[yuklin@kailualaw.com](mailto:yuklin@kailualaw.com)  
DEXTER KAIAMA, ESQ.  
Law Offices of Dexter K. Kaiama  
[cdexk@hotmail.com](mailto:cdexk@hotmail.com)  
*Counsel for KAHEA: THE ENVIRONMENTAL  
ALLIANCE*

IVY MCINTOSH  
[3popoki@gmail.com](mailto:3popoki@gmail.com)  
*Witness for the Hearing Officer*

PATRICIA P. IKEDA  
[peheakeanila@gmail.com](mailto:peheakeanila@gmail.com)  
*Witness for the Hearing Officer*

CLARENCE KUKAUAKAHI CHING  
[kahiwaL@cs.com](mailto:kahiwaL@cs.com)


B. PUALANI CASE  
[puacase@hawaiiintel.net](mailto:puacase@hawaiiintel.net)

PAUL K. NEVES  
[kealiikea@yahoo.com](mailto:kealiikea@yahoo.com)

WILMA H. HOLI  
P. O. Box 368  
Hanapepe, HI 96716  
*Witness for the Hearing Officer  
(no email; mailing address only)*

MOSES KEALAMAKIA JR.  
[mkealama@yahoo.com](mailto:mkealama@yahoo.com)  
*Witness for the Hearing Officer*

DATED: Honolulu, Hawai'i, November 17, 2016.

  
\_\_\_\_\_  
IAN L. SANDISON  
TIM LUI-KWAN  
JOHN P. MANAUT  
Attorneys for Applicant  
UNIVERSITY OF HAWAI'I AT HILO